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SEVENTH REPORT ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

by

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INTRODUCTION

A. Methodology of the report

1. During the debate on the report of the International Law Commission in the General Assembly, one delegation suggested 1/ that it might be worthwhile for the Commission to prepare an overall assessment of the current status of the topic and also to indicate the direction it intended to take in the future instead of continuing with the article-by-article analysis. The Special Rapporteur found the suggestion sensible and tried to follow it. However, in the process the suggested method of work underwent some modification, since it seemed that it would also be useful to dwell on those articles which had been the subject of commentaries of some significance during the debates, in both the General Assembly and the Commission. In that way, it would be possible to draw attention to the most salient problems that had been raised and also to suggest possible solutions and alternatives. For, while it is true that there is no consensus on several aspects of the topic - including the basic aspects - it appears to the Special Rapporteur that majority views are emerging and that they do coincide in important areas. It is not his task to arbitrate the differences or to decide that a majority or minority feels one way or another, but simply to try to offer alternatives to make viable a possible negotiation, perhaps at a later stage of development of the topic, particularly on those aspects of the draft articles which call more for progressive development than for codification of what already exists. The Special Rapporteur believes that the debates have revealed the existence of a strong demand for some pronouncement on the subject, and that this pronouncement should be made without too much delay, owing to the speed with which treaty norms on specific activities are being developed.

B. Nature of the instrument

2. Some delegations said that they were in favour of not codifying international law on the subject as yet. According to them it would be preferable to have a code of conduct or mere guidelines for States. Many other delegations, on the other hand, said that they were in favour of mandatory norms. Within this latter group, some favoured considering activities involving risk separately from those with harmful effects.

1/ "It was suggested that, since the Commission had developed its study in directions which had been scarcely imaginable in 1978, increasing its scope to such an extent that completion of the work seemed a distant prospect, the Sixth Committee should take a fresh look at the topic, not article by article, but in broad terms, to see whether it agreed with the direction the Commission's work was taking, and might also consider assigning priority to some specific aspects, bearing in mind the current needs of the international community. To that end, it was proposed that the Commission present the Sixth Committee with an overall review of the status of its work on the topic and an indication of the direction it intended to take in the future." (A/CN.4/L.456, para. 450).

3. As to the first point, namely, whether or not the provisions resulting from the combined efforts of the Commission and the Sixth Committee on this topic should be mandatory, your Special Rapporteur feels it is worth referring to one of the Commission's earlier reports where, following a suggestion by one member to the effect that "if the Commission were not concerned about drafting rules for a convention which required acceptance by States, it could more easily accept certain hypotheses and draft articles", it was said that the Special Rapporteur did not believe "that at the present time the Commission should even be concerned about the eventual form of the articles of this topic" nor did he think that the eventual form of the articles should affect the method of work of the Commission. "In his view, the Commission should be concerned with drafting coherent, reasonable, practical and politically acceptable articles. Factors or criteria should be scientific, identifiable and logical, with the aim of improving international law and inter-State relations. In the final analysis, the provisions of this topic would win support and compliance because of these factors and not necessarily because of the form in which they appeared." 2/

4. That is the criterion which we have applied so far. To announce right now that the Commission will deal only with recommendations or guidelines would be to reject a current of opinion that is favoured by a large number of delegations in the Sixth Committee and by members of the Commission who have spoken of the need for a binding instrument in this field. At the end of this exercise, the Commission will decide what to recommend to the General Assembly regarding the nature of the articles to be proposed, and it is the General Assembly which ultimately will resolve the matter. It seems therefore neither possible nor desirable to anticipate the action of the Assembly.

I. TITLE OF THE TOPIC

5. In English, the title seems to give the Commission a different and more restricted mandate than it does in French. In fact, in English it reads as follows: "International liability for injurious consequences arising out of acts not prohibited by international law". In French, on the other hand, the word "acts" is replaced by "activités". Whereas the English title would not, strictly speaking, allow the Commission to deal with anything but the aspects relating to reparation or compensation for those injurious consequences, the French title considerably broadens the picture. If we deal with "acts" rather than "activities", prevention would have no place here, firstly because prevention is expressed in primary obligations or, if you will, prohibitions, and we would therefore not be dealing with acts "not prohibited by international law". This has been one of the classical objections among critics of the topic in general. Furthermore, the English title speaks of liability for such injurious consequences, which means that it takes the hypothesis that the harm (injurious consequence) has already occurred. It

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2/ See Yearbook ... 1987, vol. II (Part Two), paras. 191 and 192.

would then be a legal development of what in Spanish is generally called "responsibilidad objetiva o causal" and in English "strict liability". Thus, notwithstanding a suggestion that has repeatedly been made in previous debates in the General Assembly and in the Commission to the effect that prevention is an indispensable chapter of this topic, according to a strict interpretation of the English title there would be no place for such prevention.

6. If, on the other hand, the focus of our topic is shifted to "activities", the picture broadens considerably. The Commission's mandate would be to try to come up with a legal regulation of certain activities given the fact that their existence produces, or might produce, injurious consequences. The word "responsibility" in relation to "activities" acquires its two legal meanings: the one relating to the consequences of deeds and also the one referring to the imposition of obligations. 3/ In that case, given the injurious

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3/ See the discussion of the topic in the preliminary report by the previous Special Rapporteur, Mr. Quentin Baxter, Yearbook ... 1980, vol. II (Part One), pp. 250-252, document A/CN.4/334 and Add.1 and 2, particularly footnote 17 which, inter alia, when commenting on the use of the English terms "responsibility" and "liability", in the "Informal Composite Negotiating Text/revision 2" of the Third United Nations Conference on the Law of the Sea, gives the following examples:

> "(a) Responsibility and liability = responsabilités et obligations qui en découlent; liability = obligation de réparer.
>
> "(b) Responsibility and liability = obligation de veiller au respect de la convention et responsabilité en cas de dommages; States are responsible ... = il incombe aux Etats de veiller ...; international law relating to responsibility and liability = droit international relatif aux obligations et à la responsabilité concernant l'évaluation et l'indemnisation des dommages."

The second report of this Special Rapporteur on the same topic concurs with this assessment and, quoting Goldie, states that:

> "The terms 'responsibility' and 'liability' here and in articles VI and XII of the 1972 Convention on International Liability for Damage Caused by Space Objects are used with different connotations. Thus in both treaties, responsibility is taken to indicate a duty, or as denoting the standards which the legal system imposes on performing a social role, and liability is seen as designating the consequences of a failure to perform the duty, or to fulfil the standards of performance required." (A/CN.4/402, para. 4)

Those, undoubtedly, were the meanings of the terms "responsibility" and "liability", at least in international practice and without venturing into the dangerous territory of the meanings of those terms in Anglo-Saxon law.

consequences of certain activities, the aim would be to impose primary obligations of prevention, whose violation would entail certain legal consequences (secondary obligations), and also to establish other primary obligations in which harm would be a condition for reparation, irrespective of whether there was failure to observe any obligation. We could be within the mandate of the General Assembly in establishing norms on prevention, since they would fall within the concept of responsibility, that is to say, the imposition of obligations in view of the injurious consequences of certain activities. They would primarily be the activities contained in chapter III. Matters relating to reparation (chapter IV) would fall under the mantle of liability. Perhaps the full scope of the topic in this aspect could be expressed, in English naturally, by a term which has won considerable acceptance in international law in our days: "responsibility and liability". There would be no problem whatsoever in either Spanish or French because responsibilidad and responsabilité cover the meanings expressed by the two above-mentioned English words.

7. This has already been discussed in the Commission 4/ and the general consensus was that "activities" was preferable to "acts", and the Special Rapporteur and the Commission itself have acted upon that assumption ever since. If international practice is to be taken into account in the development of a topic in the Commission, it is clear that we should go with "activities" since nearly all conventions dealing with transboundary harm refer to the "activities" which produce such harm. At the time, however, it was agreed that discussion of the change in title should be postponed to a later stage in the development of the topic, at which time it would be possible to see clearly all the possible modifications to be suggested. Perhaps that time has come.

II. THE FIRST 10 ARTICLES

A. Articles 1, 3, 4 and 5

8. These articles were transmitted to the Drafting Committee and, as explained in the sixth report, would have been modified - particularly article 2 5/ - had the concept of "dangerous substances", introduced on a wholly experimental basis in that report, been accepted. It is the Special

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4/ "A number of members supported the Special Rapporteur's proposal that, at some stage in the study of the topic, it should be suggested to the General Assembly that the word "acts", in the title of the topic, be replaced by "activities" so that all the language versions would be aligned with the French. There was no opposition to this proposal or to the basic reasoning by which the Special Rapporteur justified the change." (Yearbook ... 1986, vol. II (Part Two), para. 216)

5/ See A/CN.4/428, paras. 18-21.

Rapporteur's opinion that, of the texts in question, at least those relating to principles should be considered by the Drafting Committee at the current session. In the most recent debate in the Sixth Committee, several delegations drew "attention ... to the United Nations Conference on Environment and Development scheduled for 1992, and the hope was expressed that the work of the Commission would be, if not finished, at least brought to an advanced stage so that it could be presented at that Conference". 6/ The Special Rapporteur believes that perhaps the best contribution that could be made to this extremely important international meeting would be the elaboration of principles in this area and accordingly suggests that they be considered by the Drafting Committee at this meeting.

1. Scope of the present articles (article 1)

9. Article 1, concerning the scope of the present articles, may require drafting changes on the basis of suggestions put forward during various debates but appears to have secured majority support regarding the activities it seeks to cover: activities involving risk, i.e. those which have a higher than normal probability of causing transboundary harm, and activities with harmful effects, or those which cause transboundary harm in the course of their normal operation.

10. As to whether the two types of activities covered by the draft should be treated separately or together, it would appear useful to treat them jointly, on the understanding that if at the end of the exercise this method should be deemed inappropriate, the Commission could decide to consider them separately. This is because, to date, it has not been convincingly demonstrated that they are in fact so different as to warrant separate treatment. It should be recalled that, initially, the present articles were intended to introduce acceptable general principles in this area: limits to a State's freedom of action within its territory, cooperation, non-discrimination, prevention and reparation. All these are clearly applicable to both types of activities. Thus focusing the regime governing activities involving risk solely on prevention overlooks the fact that the harm normally caused by such activities must be compensated, and this requires that the principle of compensation be explicitly set out in the articles, since it is not specified in international law, at least according to one school of thought. Furthermore, the notion of prevention is applicable to both types of activities. This notion covers two concepts which should be distinguished:

(a) In so far as unilateral measures are concerned, States have identical duties vis-à-vis both types of activities: the State must set out legislative and administrative measures which specify the precautions to be taken in each case by operators and it must monitor their implementation. A

6/ A/CN.4/L.456, para. 439.

State's liability in the event of non-compliance would be the same irrespective of which type of activity is involved, as will be seen below. The operator, for his part, if he failed to comply with his obligations, would ultimately be penalized by the domestic law of his State; if transboundary harm occurs, the matter becomes first and foremost one of civil liability, to be decided by the competent court.

(b) As for procedural measures, they are obviously useful and necessary regardless of the type of activity involved: in dealing with any activity described in article 1, it is of fundamental importance that, in accordance with article 11, the transboundary effects should be assessed, notification made and consultations held in all cases. The regime that is ultimately accepted may differ depending on the specific type of activity involved, but the formal steps will be the same for all activities.

11. Although the idea was not much discussed, one delegation suggested that the article should refer only to new activities, that is, to activities to be undertaken in the future, and not to existing, ongoing activities. While this issue is of major importance and will have to be settled, it does not call into question the two basic types of activity covered by this article.

12. There is another point of view that has nothing to do with separate or joint treatment, as it seems to accept all of the above, it would extend the draft to cover unforeseeable harm. The Special Rapporteur is not unclear as to the thrust of this view: if it refers to harm which is caused by an activity whose circumstances make it impossible to foresee or identify the harm at the outset but which is nevertheless inherent in the activity, the Special Rapporteur thinks that the situation is already covered in the draft articles by virtue of the way the articles operate. Actually, from the moment harm is caused through the normal operation of an activity or risk is established as being inherent, the activity falls within the definition of article 1 and thus under article 3, it would be sufficient for a State to know - or to have the means of knowing - that an activity referred to in article 1 was being, or was about to be, carried out in its territory for the activity to be subject to the obligations established in the draft articles.

13. However, if the point is that any transboundary harm must be compensated, even if it is caused by an activity that is normally harmless and remains harmless after the harmful incident, the question requires further study. If an activity is not deemed hazardous and has no harmful effects, there is little likelihood of its actually causing transboundary harm. This might be the case if an auxiliary cause exists, that is, a cause not related to the activity in question which interferes with the normal course of events and has an unexpected effect. Such interference may or may not be foreseeable, but it is in any event unrelated to the activity itself. To consider such a hypothesis, then, would require a diversion of attention away from the activities, which are the crux of the matter, to consider the harm, in whatever form it might take, thereby leading to a change in the scope of the draft; given the small number of instances of harm occurring this way this would hardly seem warranted. To look at the topic exclusively from the

standpoint of the harm produced would be to ignore the most pressing demand of our time which is the establishment of legal norms to govern liability for the consequences of certain human activities. It is these norms, and not the relatively academic concern for spelling out all possible forms of harm, which have become a veritable obsession today. This is not to say that damage of the type just mentioned should go uncompensated; it may be appropriate to do so by virtue of the general principles of international law. Barring any evidence to the contrary, however, the matter would not seem to be important enough to warrant a change in the scope of the articles.

2. Knowledge or means of knowing (article 1)

14. Although some doubts were raised regarding the central idea that liability is contingent upon the fact that a State "knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried out in its territory", they were not pursued. The presumption in the final paragraph would seem to restore a sense of balance to this provision.

3. Articles 4 and 5

15. Article 4 seeks to express the idea that where the provisions of the present articles are incompatible with those of a treaty governing a specific activity between the same States parties, the provisions of the treaty shall prevail. To bring the text into line with the language of article 30 (2), of the Vienna Convention on the Law of Treaties, it might be redrafted as follows:

> "In the case of States parties to the present articles which are also parties to another international agreement concerning an activity or activities referred to in article 1, the present articles shall not be considered incompatible with the provisions of that other international agreement."

16. Article 5 did not require any changes other than editorial changes, which were incorporated into the new draft.

B. Principles (articles 6 to 10)

1. The fundamental principle (article 6)

17. Article 6 sets out the basic principle, inspired by the wording of principle 21 of the Stockholm Declaration. Although drafting changes have been suggested, many of them acceptable, a broad consensus exists on the central idea.

2. Cooperation (article 7)

18. Article 7 sets out the principle of international cooperation to achieve the objectives of the draft. One original aspect is the obligation of affected States to cooperate, whenever possible and reasonable, with the State of origin in containing or minimizing the harmful effects of an activity occurring in the territory of the State of origin. Once again, the principle cannot be said to have elicited any substantive objections, although important suggestions were made with regard to its improvement. One of these was to word the principle in a way that would cover actions by private parties, so that anyone exposed to the effects of an activity in the affected State might have access to information about the activity available to both the State of origin and private entities or individuals of that State. In addition, such entities or individuals ought to have access to any administrative proceedings that take place in the State of origin to assess the transboundary impact and to the permit, if one exists, authorizing the activity.

3. Prevention (article 8)

19. Although the notion of "prevention" after an incident gave rise to some misgivings, the sound international practice which establishes it cannot be debated. 7/ However, the wording of this article ought to be changed if some of the suggestions put forward in recent debates are accepted. As it is, article 18, which does away with any consequences for failure to comply with obligations in respect of prevention, was not well received by the Commission or the General Assembly.

20. When the commentary takes up article 18, the suggested changes will be considered in greater detail; for the time being, however, one modification should be made to article 8, which sets out the principle of prevention and anticipates the procedural measures contained in articles 11 to 15 as well as the unilateral measures set out in article 16, making it clear that they confer upon States only obligations which are proper to States, i.e. the obligation to take legislative, regulatory and administrative measures to "guarantee" or "ensure that" the activities referred to in article 1 which take place under their jurisdiction or control do not cause significant transboundary harm if they have harmful effects, or that the risk of causing such harm is minimized if the activities are dangerous, or that the harm is contained and minimized if the harmful effect has already been unleashed. The last paragraph of article 8 should also be deleted, since under normal conditions States appear to be able to take the necessary legislative, administrative or police action. It will be seen that, as regards the procedural obligations set out in articles 11, 13 and 14 of chapter III, which are also considered obligations of "prevention", although it is considered by

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7/ See para. 22 of the sixth report of the Special Rapporteur (A/CN.4/428).

some that they can only have their basis in cooperation, a different approach may be possible.

4. Reparation (article 9)

21. Article 9 ought to be drafted so as to reflect the interrelationship between the liability of a State and that of operators under the regime of civil liability. During the most recent debate in the Sixth Committee many delegations let it be known that they generallay favoured the inclusion of norms that would clarify this interrelationship. Coming back to the notion of innocent victim, which has been somewhat overlooked along the way, the principle might stipulate that what was important was that the victim should obtain compensation for the injury suffered, thereby making it clear that if compensation is awarded, the State may, in cases specified in the instrument, assign liability to private parties. This would give expression to a view widely voiced in both the Sixth Committee and the International Law Commission, according to which the State would have residual liability vis-à-vis that of the operator. Some delegations, albeit fewer than those sharing the former view, said that the State must have primary liability. The Special Rapporteur feels that a middle way can be sought. On the one hand, it is quite clear that virtually all 8/ the conventions governing specific activities place primary liability with the operator or another responsible party, as will be seen, and assign to the State a measure of subsidiary liability when the operator is unable to make the appropriate restitution in full. Perhaps this liability of the State should be extended to other cases in which innocent victims are unable to obtain compensation. The State, then, might be liable for reparations in cases where the injury cannot be compensated in full through private channels, either because: (a) the operator at fault or his insurer are unable to compensate the injury in full, or (b) the operator or operators at fault cannot be identified (long-range pollution, multiple operators making it impossible to identify those responsible, as in cases where the harmful effect originates in an entire region within a State, etc.).

22. Of course the State may discharge its responsibility in various ways - by establishing a fund, as provided for in the Brussels Convention on nuclear damage, if situation (a) above applies, or by requiring operators in the

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8/ With the exception of one, concerning liability for space objects; however, attention has already been drawn to the special nature of this legal instrument, which was based on strict State control not only over activities conducted by the State but also over private activities carried out under its authority. As Goehring and Doeker point out, "The stipulation of liability of the controlling State corroborates its obligation to continuously supervise and control governmental, as well as private, space enterprises." ("Private or international liability for transnational environmental damage: the precedent of conventional liability regimes, unpublished, 1990, p. 17)

region of the country where the harmful effects originate or, whenever possible, multiple operators who collectively cause transboundary harm to set up a special fund to compensate the harm or to take specific precautions to prevent the occurrence of the harmful effect, etc. Ideally, in such cases the State of origin would take part in the conversations with the affected States referred to in articles 11 and following in order to establish a regime that would govern the activity in question at the international level. Finally, it should be noted that only in case (b) described in the preceding paragraphs, or whenever a State has primary, and not assigned, liability, can the negotiations between the State of origin and the affected State called for in current articles 9 and 21 take place; this is not so in case (a), where private channels under the regime of civil liability would be available.

23. Some delegations in the Sixth Committee, as well as some members of the Commission, will surely maintain that the State has primary liability. The Special Rapporteur is, of course, entirely neutral on the matter and will only confirm that the number of delegations and members who have spoken in favour of "residual" responsibility of the State is considerable. In addition, the idea of primary liability on the part of the State in situations such as those described in case (b) in paragraph 2 will surely be resisted by some States and by members of the Commission as well. The question is one that should be negotiated if the articles are to one day form the basis of a convention, and the Special Rapporteur would suggest to the Commission that both alternatives be retained: article 9 as it currently exists and a new article that would reflect the aforementioned ideas.

5. Non-discrimination (article 10)

24. Article 10 was generally well received, as it sets out a principle that is almost perfect in the abstract. There were few objections, one of them being that the principle can operate only between States with similar or comparable legal systems. Yet if the regime of civil liability is to be applied, this principle is absolutely necessary and will compel States to confer upon citizens or residents of other countries treatment no less favourable than that which they accord to their own residents. The objection raised here is that some countries may treat their own residents less well than what is generally considered the international standard. In reality, the draft articles will set an international standard once they establish the principle of prevention and reparation as well as other principles which, precisely because of non-discrimination, must be applied by all Member States. For example, article 29 (b), says that "States parties to these articles shall make provision, in their domestic legal systems, for remedies that permit prompt and adequate compensation or other reparation of transboundary harm caused by activities referred to in article 1 carried out under their jurisdiction or control." It will be recalled that the phrase "prompt and adequate compensation or other reparation" in itself constitutes an international standard.

C. Article 2

1. Dangerous activities (subparagraphs (a) to (d))

25. Subparagraphs (a) to (d) define what is involved in the concept of "dangerous activities". They were inserted simply on a trial basis to satisfy the longstanding objection that the scope of the articles should be well defined. At the same time they make it easier to apply the key concept of "significant risk", since there is the presumption that all activities involving the use of dangerous substances carry such a risk; which presumption is confirmed when borne out by other simpler assessments such as a consideration of the quantities or concentrations of the dangerous substances or the situations in which they are used (see subparagraph (b)). The subparagraphs help, then, in determining the "significance" of the risk and at the same time circumscribing the scope of the articles. For a risk to fall within their scope, it must be fairly substantial. It can easily be seen that some activities, the so-called ultra-hazardous ones, fall within our competence. But moving down the scale, where does one draw the line? How are we to define the concept of "significant risk", or better yet "higher than normal risk", which is perhaps the exact idea we are trying to convey? All human activities present some risk, as was pointed out during the earliest debates on the topic. We should as far as possible identify the risk that concerns us, since it is impossible to quantify it.

26. The Sixth Committee was not generally favourable to the idea of a list of dangerous substances. "Most representatives favoured a general definition and found a list of substances to be unhelpful and inappropriate." 9/ There were a number of objections and we shall deal with the main ones: (a) some substances like water are not dangerous, yet a dam forming a lake can create a certain serious risk of transboundary harm; (b) a list of dangerous substances is unnecessary because an activity involving the use of a dangerous substance must in every case be assessed as to the "quantities or concentrations or in relation to" the "risks or situations in which [the substance] may occur" (article 2 (b), end, just discussed), and it must always be determined if it really poses a "significant risk" of transboundary harm; (c) it would be necessary to update the list rather frequently, which is laborious, and even so it could never be really exhaustive and would create loopholes; and (d) it would change the nature of the draft articles, so that instead of being a framework agreement encompassing all activities they would become an instrument intended to regulate specific activities.

27. Some additional comments on this question of dangerous substances might perhaps help fellow members to accept an alternative that, while not satisfying everyone entirely, would be to some degree satisfactory to each one. A first point to be borne in mind is the importance of the precedent established by the Council of Europe draft rules, which, if they eventually become a convention, will be the only instrument similar to the draft on which

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9/ See A/CN.4/456, para. 451.

we have been working. Indeed, all the existing conventions on liability for transboundary harm refer to a specific activity. The Council of Europe draft rules instead deal with any dangerous activity; they would constitute a general convention just as our draft articles are intended to be. The approach taken by that draft is accordingly the most appropriate model for our own work.

28. Some lists of dangerous substances already exist. The one contained in appendix I to Council of Europe Directive 67/548 includes 1,200 substances. 10/ Whether we adopt this list or adapt it to the needs of a global convention, it is obvious that it covers an extremely broad spectrum. Add to this the fact that subparagraph (i) broadens that scope to all activities which use technologies that produce hazardous radiation and that subparagraph (ii) includes activities which introduce into the environment genetically altered organisms and micro-organisms, both of which may be dangerous, and the spectrum becomes still broader. Furthermore, a list that is exhaustive, a sine qua non for some delegations in the Sixth Committee and some colleagues in the Commission, is an impossibility: (a) because there are close to 60,000 chemical substances in existence and the technical experts believe that their effects cannot be known with certainty, especially in view of the lengthy experimentation often required 11/ and (b) because any activity involving the use of one or more of the substances or technologies contained in the list must be assessed by the authorities to determine, as we have just seen, the presence of the other circumstances that constitute the "significant risk of transboundary harm" required for including the activity within the scope of the present draft articles. 12/ So much for the "exhaustive" nature of any list purporting to be so, especially if one bears in mind that there are substances that cannot be included in the list - water for instance - which nevertheless can be dangerous in some cases.

29. The objection based on substances like water also goes against the idea of an exhaustive list: it is obvious that the European draft rules are directed towards substances handled by industries or stored, transported, and so on. Although the statement at the end of our article 2 (b) - that a substance may be considered dangerous if it occurs in certain quantities or in

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10/ See CJ-EN (90) 11 (Committee of Experts on compensation for damage to the environment, report of the meeting of the Working Group), p. 5.

11/ Ibid.

12/ This must be done because, aside from the reasons given, it is technically almost impossible to specify in the abstract the quantities or concentrations required for classifying a substance as harmful. That was the conclusion of the technical experts who worked on the Council of Europe draft rules in question (see op. cit., p. 6, subpara. (d)). This supports our contention that it is impossible to draw up a list of substances that would render automatic the procedure for classifying an activity as dangerous.

relation to certain risks or situations in which it may occur - might, if taken to the extreme, be applied to water, it seems clear that this was not the drafters' intention and it would be very strange to see water heading any list. In view of this, and in order to ensure that the draft articles do not become an instrument limited to certain specific activities instead of the framework convention originally envisaged, any such list should be only illustrative and be contained in an annex as an accompaniment to a general, yet as far as possible complete, definition of dangerous activities. Such a list would not serve the purpose of automatically indicating activities that were dangerous for the purposes of the draft articles, but it could serve as a useful illustration, in that any activity involving the use of one or more of the substances listed would have to be examined to assess the potential for transboundary harm and thus the nature of the risk posed. This, then, is the alternative referred to earlier.

2. Transboundary harm (subparagraph (g))

30. Subparagraph (g) deals with the indispensable concept of transboundary harm. It has been suggested that it is too important to form part of an article on the use of terms; that, however, is the approach taken in various major instruments. 13/ It could also appear separately under the heading of "Transboundary harm and compensation" and include the concepts in article 24. In any case, the various concepts of harm should appear in separate subparagraphs. Compensation for harm to the environment should, according to comments received repeatedly, encompass only the cost of reasonable measures actually taken to restore the status quo ante.

3. "Appreciable" [significant] harm (subparagraph (h))

31. The reaction to subparagraph (h) indicates that difficulties still exist with regard to the definition of "appreciable" or "significant" harm, although it was not the intention that that subparagraph should give a definition in the strict sense but only that it should give a certain idea of what was involved. Opinion seems to be leaning, for the time being, towards the concept of "significant" harm, because it conveys somewhat more substance or magnitude than does the word "appreciable". One criticism of the definition

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13/ The Council of Europe draft includes it among the definitions in article 1, as do the draft Convention on civil liability for damage caused during carriage of dangerous goods by road, rail or inland navigation vessels, the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Sea-bed Mineral Resources, article 1 (6), the Convention on the Regulation of Antarctic Mineral Resource Activities, article 1 (15), the Convention on International Liability for Damage caused by Space Objects, article 1 (a), and the Vienna Convention on Civil Liability for Nuclear Damage, article 1 (k), among others.

was directed towards the use of the word "nuisance" in the English version, because naturally that expression has a different technical meaning in the Anglo-Saxon legal system. Actually, the word used in the original Spanish version was molestia, which means a slight disturbance. At any rate, it might perhaps be preferable not to define something that in such a general framework is difficult to define. That same concept was also not defined in the watercourse regime.

III. PREVENTION

A. Procedure

1. Articles 11 (a), 13 and 14

32. The substantive articles of the procedure are 11 (a), 13 and 14. Article 11 (b) deals with a particular case of 11 (a) and articles 12 and 15 deal with related subjects, that is, the participation of international organizations (or bodies) and the protection of national security or industrial secrets. Basically, the procedure is that the State of origin shall assess the transboundary impact of any activity suspected of coming under article 1 that is about to be [or is being] carried out under its jurisdiction or control. If it is indeed an activity involving risk or with harmful effects, the State of origin shall notify the States presumed to be affected, enclosing the information available. If the affected States think it necessary, consultations may be held under article 14 and these could lead to the establishment of a regime for the activity that would make it bearable and would take into account the interests of all States parties. The regime would essentially be an international one, since it would be based on an accord between the participating States, but it would of course also include aspects of their internal law and in particular that of the State of origin. Agreement might be reached on cooperative measures to avoid the transboundary harm or make the risk thereof acceptable, safety measures to be required by the State of origin when authorizing the activity, identification of the private parties responsible, participation by affected individuals in the administrative procedures of the State of origin, establishment of a compensation system for those injured, whether or not to have an insurance scheme, possible limitation of the responsibility of the operators, whether any responsibility attaches to the State of origin and in what cases, etc. All of which will be easier and will go more smoothly if the negotiations focus on one activity in particular.

33. One objection was raised to the idea of establishing a procedure such as the one described above: the fact that a State cannot be burdened with obligations like those mentioned above in the context of so general a legal regime as that of these articles. But the obligations to assess the environmental impact - and accordingly, any transboundary impact - of any activity under the jurisdiction or control of the State, and to notify those concerned and to provide them with all the necessary information, as well as to carry out the necessary consultations, are fairly well established in

international law. 14/ This is because persons affected cannot interfere in what is happening in a foreign jurisdiction nor, therefore, can they control the authorization or development of activities that may affect them. This responsibility of the State of origin arises naturally from its exclusive and exclusionary territorial jurisdiction. 15/ The list of dangerous substances,

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14/ See Economic Commission for Europe document Environmental impact assessment in a transboundary context (ENVWA/AC.3/4), which sets forth the obligation of the State of origin to assess the environmental impact of any activity before authorizing it (art. 2); to notify promptly States it thinks may be affected (art. 7); and to consult on measures to mitigate the transboundary effects, other forms of possible mutual assistance to reduce transboundary impacts from the planned activities, and any other appropriate subject relating to the above-mentioned activity.

15/ These concepts were well established in the island of Palmas case:

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations." (United Nations, Reports of International Arbitral Awards, vol. 2, p. 838)

To this sovereign right corresponds an obligation that the arbitrator Max Huber points out a little further on:

> "Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has, as corollary, a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian." (Ibid., p. 839)

In one of the debates on this matter in the Commission it was said that if a State is responsible for the harm that activities in its territory may cause to foreigners within that territory, a fortiori it must be responsible

if accepted, will facilitate the operation considerably, since any activity using them must be reviewed to assess its degree of risk. Furthermore, it must be borne in mind that, when dealing with this type of activity, all States as a rule insist on prior authorization so as to protect their own people, and ask for information from the applicant for that purpose. It is, therefore, entirely logical for the State of origin to brief the States presumed affected on the possible existence of activities being carried on under its jurisdiction or control that are likely to have transboundary effects.

34. This does not mean that the State must make that assessment itself; naturally, it may require the operator to do so as a condition of granting the authorization. But it does mean that the State in question must review and check the accuracy of the assessment, since in a way it would be engaging its own responsibility ad exteros.

35. In any case, because of the above-mentioned objection an attempt was made to simplify the procedure as much as possible. This desire for simplification should not, however, as was pointed out by some delegations in debates of the Sixth Committee, exclude the obligation of the State of origin to permit access by private legal entities and individuals of the affected States to its administrative procedures for authorization of the activity concerned. Such access would give any possible victims the best guarantee that their interests would be defended.

36. During those same debates, it was also observed that the proposal makes no mention of whether authorization for development of an activity coming under article 1 would be subject to the outcome of the consultations mentioned in article 14. Of course, the idea is not to give persons affected a veto over development of an activity in States of origin, nor even to mandate a delay that might be unjustified. That, too, was clearly brought out in the Commission and in the Sixth Committee. One possibility would be the one adopted in the draft article, that is, that if the State of origin considers it appropriate on the basis of the studies carried out, it would authorize the commencement of the activity in question, always provided: (a) that if the activity produces transboundary harm, the State must assume liability for the whole of the compensation and (b) that it may be obliged to take measures that will mean costly changes to existing investments and facilities, particularly if, owing to the conditions mentioned in article 20, the authorization granted has to be withdrawn. The objections might be withdrawn if these two conditions, which in the view of the Special Rapporteur are implicit in the wording, were explicitly set out.

(continued)

for harm caused to foreigners who reside in the territory of their own State. Something similar may be said of expeditions organized within the territory of one State against the Government, or the public order, of another State.

37. Another conceivable possibility in this area is that the State of origin might not authorize new activities under article 1 until the international obligations were entirely discharged. The Special Rapporteur, and the Committee with him, have preferred the previous solution, but that does not mean that it cannot be reconsidered if development of the topic reaches the stage of negotiation of the terms.

38. As for article 14, it simply confirms the obligation of the State of origin to consult with those affected. The previous article 16, which is replaced by article 14, went further, since it spoke of the obligation to negotiate a regime for the activity for which the procedure was being begun. That obligation to negotiate was to be understood as it is in international law, particularly following the North Sea Continental Shelf, 16/ Fisheries Jurisdiction United Kingdom v. Iceland, 17/ and Lake Lanoux cases, and particularly the paragraph of the advisory opinion of the Permanent Court of International Justice in the case of Railway Traffic between Lithuania and Poland which states that the obligation to negotiate is an obligation not only to listen to the other party, "not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements". 18/ In other words, with the old article 16, 19/ the State of origin was, of course, under no obligation to succeed, by any means possible, in working out some regime for the activity in question with the affected State. It simply had to comply in good faith with the obligation to try to do so; as the International Court of Justice stated concerning the North Sea Continental Shelf cases:

> "The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it". 19a/

16/ Federal Republic of Germany v. Denmark, and Federal Republic of Germany v. Netherlands judgment of 20 February 1969, ICJ Reports, 1969, pp. 47 and 48.

17/ Judgment of 25 July 1974, ICJ Reports, 1974, p. 31.

18/ PCIJ, Series A/B, No. 42 (1931), p. 116.

19/ See A/CN.4/423, paras. 144 to 147.

19a/ ICJ Reports, 1969, p. 48 para. 85.

39. Some opposition to that idea was voiced in the Commission, on the grounds that it was excessive, and hence the level of the obligation has been lowered to one of mere consultation. Hence the permissive atmosphere surrounding initiation of activities and the prior obligations of the State of origin to inform and consult, but naturally all of that would be the responsibility of that State should any harm occur.

40. The foregoing takes into account articles 11 and 14. Article 13 simply transfers the initiative with respect to the procedure to the affected State, and is necessary in the event that the State of origin does not fulfil its obligation under article 11. What happens if the State of origin, even after being warned, still does not fulfil the obligation? Here, too, there would be alternatives. One would be to grant the affected State every possibility offered by general international law when an international obligation is violated. Another would be to allow the questioned activity to continue in the State of origin under its responsibility, and only in the event that transboundary harm resulted would the process indicated in paragraph 33 take effect, and that is the course followed up to now by the draft articles.

2. Articles 11 (b), 12 and 15

41. Article 11 (b) is meant to facilitate identification of States presumed to be affected by an activity in the State of origin, since it is probable that an international organization or body is in a better position than an individual State to make such a determination. It is known, for instance, that the United Nations Environment Programme (UNEP) has a global environment monitoring system (GEMS), which receives information from all over the world and which can help individual States to determine the magnitude of a certain transboundary impact. Some scepticism has been expressed in the Commission, even though the principle of participation of international organizations was received warmly at first, since those which have general competence in the area may not be mandated by their charters to take action on questions such as these. Some colleagues have also wondered what would happen in the case of non-member States, or who in the end would pay the expenses incurred. We think that such obstacles can be overcome. Article 11 (b) involves a service that an organization such as UNEP, at any rate, whose competence in this area would be difficult to question, is perfectly able to provide - not to mention other regional organizations that may have similar information capabilities. Also, there seems to be no reason for the statutes of such organizations to prohibit in any way provision of the service if, in the final analysis, its financing is assured - even though a non-member State may be one of those presumed to be affected - and may be defrayed in principle by the State of origin and be the object of a prior agreement between the organization concerned and that State. In some cases, an increase could be made in the budget of some organization which experience shows can help in such an exercise.

42. That is the essence of the participation of an international organization as called for in article 11 (b), and it would be as well to say so expressly

at the end of said norm, so as to avoid confusing this action with that of article 12, which is of a completely different kind. It is no longer simply a matter of detecting transboundary effects of a given activity but also of bringing the parties together, facilitating their talks, clarifying technical points that may arise during such talks, etc. Needless to say, if the international entity in question refuses to participate as it is asked to do in article 12, it is under no obligation to do so, but it is part of the general mandate of international organizations to foster cooperation between their members, and possibly between these and non-member States. That is what they were created for, and the Special Rapporteur thinks that few international organizations would refuse to take the action authorized in article 12, always provided that any expenses incurred were defrayed. There might be difficulties if the organization in question was a regional one having dealings with States in other regions, but such situations would naturally be infrequent and in such cases, it would be better to have recourse to an organization with a universal mandate.

3. Balance of interests (article 17)

43. Article 17 sets out, as we know, some useful guidelines for the possible negotiation of a regime for the activity. Although it was generally well received, some thought that it should be placed in an annex, since in reality it does not reflect mandatory legal norm.

4. Threshold for prohibition (article 20)

44. With respect to article 20, some delegations in the Sixth Comittee expressed concern as to the threshold of harm or risk that would trigger the obligation provided for. 20/ This question is similar to that of significant harm or risk; unfortunately, such thresholds are not a priori quantifiable. It is clear, however, that no one can be compelled to put up either with significant harm such as is unavoidable in activities with harmful effects, or with a risk, also significant, in activities involving risk, unless these are accompanied by acceptable compensation to the State affected. If negotiations with respect to the threshold of the harm or the risk fail because the parties cannot agree on what threshold is adequate for the specific case, they will have to resolve the difference in the only way provided for in such cases by international law, of which a good idea is given by article 33 of the Charter of the United Nations. Certainly it was no easy task arriving at treaties such as those that prohibit certain nuclear tests, or the emplacement of weapons of mass destruction in certain areas of the seabed, or the use of environmental modification technologies for military or other hostile purpose, but those difficulties are inherent in international life, where there are no courts having compulsory jurisdiction, nor police, nor any centralized power.

20/ See A/CN.4/L.456, para. 459.

B. Nature of the preventive measures

1. Article 18

45. The substance of article 18 has been considered earlier (see para. 20). However, there would appear to be a difference between the obligations arising under articles 11, 12 and 14, which are the backbone of the procedure, and the unilateral ones arising under article 16. With regard to the former, i.e., the procedural obligations, there would be several possibilities: (a) the obligations arising under article 11 would be either compulsory (in view of the fact that they are fairly well established in international law in general), not compulsory, or compulsory only if article 13 was applied (i.e., if a presumed affected State puts the procedure in motion); (b) the obligation arising under article 14 might simply be an obligation on the part of the States concerned to consult with each other, or it might be converted into an obligation to negotiate a regime within the meaning of paragraph 35. In any case, the most practical solution would be to delete article 18 and to draft the provisions of the other articles in such a way as to ensure that they have the effects stated above.

2. Article 16

46. Many in both the Commission and the Sixth Committee were of the opinion that the unilateral measures provided for in article 16 should be compulsory. The violation of this article would therefore incur the consequences arising under general international law, or those established by a convention on State responsibility for wrongful acts, as the case may be. This seems logical: once it has been established that a given activity causes or may cause transboundary harm, the State of origin shall take measures to ensure the maximum safety conditions recommended in accordance with the best available technology, or, if it is preferred, reasonable safety measures. Accordingly, the State shall use "due diligence" in that regard. The obligations imposed by this article are typically those of a State: enacting appropriate legislation, adopting the administrative and police measures necessary to enforce compliance with such legislation, and so on. During the debate in the Sixth Committee, it was quite rightly pointed out that what the article said concerning compulsory insurance for the operators or other financial safeguards to cover transboundary harm would be more appropriate in the chapter on reparation than in the one on prevention.

IV. LIABILITY

A. State liability

1. The title

47. If it is agreed that State liability under this topic is of a residual nature, then this chapter could be entitled "State liability", and could be inserted after the chapter on civil liability.

2. Article 21

(a) The obligation to negotiate

48. Since liability was originally envisaged in these draft articles in terms of State's strict liability, article 21 sought to mitigate a situation which was both Draconian and lacking in precedents. Indeed, the extensive discussions during the general debate on the topic in both the Commission and the Sixth Committee revealed the conviction on the part of some members that there was no specific norm of general international law which imposed upon States a type of liability arising irrespective of whether or not there had been a failure to comply with an obligation; accordingly, those members were not prepared to accept an instrument which imposed such liability. Hence the way to ease the harshness of a State's strict liability was to ensure that it did not arise automatically, but was negotiated on a case-by-case basis.

49. Accordingly, the obligation to negotiate derived from the premise that whoever causes harm should repair it in some way. Negotiation is the primary method of resolving international disputes, and it is the method prescribed in the article for establishing the mode of reparation. The text states that the harm must "in principle" be fully compensated, that is to say in accordance with principles such as that of sic utere tuo, and others which are part of international jurisprudence as a result of cases such as the Corfu Channel case, the Island of Palmas case, the Lake Lanoux case, and, especially, the Trail Smelter case. Hence, the point was not for the parties to commence negotiations in order to determine whether or not compensation should be paid, but rather to decide what type of reparation would be appropriate, bearing in mind that there should be full compensation, according to the principles laid down in this area. Obviously, if negotiation did not yield a solution to the predictable differences between the parties, they could resort to all the other means afforded by general international law and by Article 33 of the Charter of the United Nations. The Commission might find that this method of negotiation is still possible in those cases - if any still exist - in which compensation is negotiated directly between Governments, as contemplated in paragraph 52.

(b) Changes to article 21

50. In light of the alternatives opened up in previous chapters, and considering that liability may fall exclusively on private operators, article 21 should undergo considerable modification. In the first place, it should establish that civil liability is primary and specify the cases in which it would fall to the State to respond, either by supplementing the liability of individual (operators, or any other party responsible) when they or their insurance are unable to fully cover the harm caused, or by replacing the liable private parties when they cannot be identified or located. The State would then assume responsibility for reparation.

51. In the first case, the competent court which heard the claim against the

liable private party may also hear the case against the State for the residual liability, or the case against a fund which the latter may have constituted for that purpose.

(c) Unidentifiable authors

52. The second case, namely that of transboundary harm whose authors cannot be identified, is somewhat more complicated. This situation may arise, for example, if the damage is caused by a large number of sources whose cumulative effect is the cause of the harm in question. In such cases, by means of article 13 - if the affected State has not been notified, and all the more so if it has - negotiations between the States may be initiated to reach agreement on a regime appropriate to the activity which causes the harm. This may be the time to consider compensation for harm which may already have been caused, together with any appropriate reductions. Thus, one of the two possible channels would be State-to-State negotiations to consider compensation for the harm caused and its potential reduction. In addition, it should always be borne in mind that private parties who suffered the harm and who have a right of action - for example, those who suffered injury to their persons or property as a result of the activity in question - may wish to pursue the domestic channel in the hope of obtaining greater compensation.

53. The other channel would be proceedings before the courts of the State of origin or the affected State as the case may be, if either of the States concerned refuses to negotiate compensation. The injured parties - including the affected State if applicable - would be allowed to file a claim against the State of origin under the terms of the current article 29 (c). 21/ Alternatively, both possibilities might coexist, meaning that the affected State could initiate negotiations for compensation or file a claim for it in

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21/ Article 29 (c) reads:

"Except for the affected State, the other persons referred to in the preceding article who consider that they have been injured may elect to institute proceedings either in the courts of the affected State or in those of the State of origin."

Article 28 (b) states:

"There is nothing in these articles to prevent a State, or any individual or legal entity represented by that State and that considers it has been injured as a consequence of an activity referred to in article 1, from submitting a claim to the courts of the State of origin [and in the case of article 29, subparagraph (c), of the affected State]. In that case, however, the affected State may not use the diplomatic channel to claim for the same harm for which such claim has been made."

the courts of the affected State, and individuals could await the results of their State's negotiations or initiate the claim directly. Individuals, in accordance with the current article 29 (c), would have a choice between the courts of the State of origin and those of the affected State.

54. In cases of harm to the environment of the affected State, only the State could institute proceedings before the competent courts, since private parties would have no right of action in such cases unless the damage to the environment had caused harm to their persons or property, in which case the normal channel would be open to them. In a recent draft report 22/ on elements which might be included in a Protocol on Liability to the Basel Convention on hazardous wastes, the following provisions are made in point X (Claims procedures):

> "Claims for damage should primarily be made through domestic courts.
>
> "For the assessment of clean-up and remedial action costs, as well as for a valuation of environmental damage, an internationalized approach should be considered e.g.:
>
> "(a) Domestic courts, assisted by an international technical advisory body to be consulted on an optional or a mandatory basis;
>
> ...
>
> "(d) An international Commission with exclusive jurisdiction."

55. In other words, when dealing with issues such as those raised by the environment, which could go beyond the usual competence of ordinary courts, there would be the possibility of intervention - optional or mandatory - by an international technical assistance body. Point X of the draft cited in the preceding paragraph includes the possibility of a specific jurisdiction for the environment, an international commission or tribunal, along the lines of that recommended in the report of 15 February 1991 of the Intersessional Working Group of Experts of the Standing Committee on Civil Liability for Nuclear Damage, under article XI A of the Vienna Convention. This international tribunal would have competence if the parties concerned give their agreement after an incident occurs, and there would be various alternatives (certain majority or unanimity of the parties); these will be considered by the future conference to amend the Conventions of Vienna and Paris. Individuals and States could litigate before this commission or tribunal without constraint.

22/ Report of the Ad Hoc Working Group of Legal and Technical Experts to Develop Elements which Might be included in a Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements and Disposal of Hazardous Wastes and Other Wastes, second session, Nairobi, 6 to 9 March 1991, UNEP/CHW/WG.1/2/L.1/Corr.1, paras. 27 and 28. The emphasis is ours.

56. In such circumstances, article 21 should adopt language reflecting the alternatives described, which would remain subject to any subsequent negotiations. This, of course, is the understanding that the norm set forth in this article is based on strict liability, which means that if there is no doubt about the causal relationship between the activity and the transboundary harm in question compensation should, in principle, be paid. Negotiations would start from that premise and would focus more on the "quantum" of the compensation; if the method chosen is the tribunal, strict liability would be applicable there too.

3. Participation of international organizations (article 22)

57. Article 22 would remain essentially the same, taking into account, however, some drafting changes proposed during the debate in the Sixth Committee. For example, instead of "an international organization [body] may intervene" it should say that such an organization [body] "shall take action".

4. Reduction of compensation (article 23)

58. Notwithstanding its definite heterodoxy, article 23 did not raise fundamental objections. Here, too, changes should be considered regarding the parties responsible for reparation, and it should be limited to cases of State liability. The phrase between square brackets would be moved to the commentary, as was quite correctly observed in the latest debate.

5. Harm to the environment (article 24)

59. Article 24 could be moved to the article on harm in general, as one or two of its subparagraphs. It should be taken into account in this provision that several objections were raised to the last part of subparagraph (a) since compensation would be limited to reasonable measures of restoration actually taken or to be taken, and to loss of earnings.

6. Joint liability (article 25)

60. In respect of article 25, in recent debates preference was expressed for alternative B. This article, unlike articles 26 and 27 which apply indiscriminately to the State or to the operator liable, could be divided into two parts to include joint and several liability in the case of private operators. In such cases, most conventions on liability for transboundary harm assign joint and several liability to operators. 23/

23/ The Council of Europe draft, to which we have referred repeatedly, envisages the possibility of incidents arising in various installations or sites where dangerous activities are taking place, and establishes the

7. Exceptions and limitations (articles 26 and 27)

61. Articles 26 and 27 should be part of a separate chapter, since they apply to any type of liability, whether of the operator or the State.

B. Civil liability

1. Interrelationship between civil liability and State liability

62. During last year's debates, to which this report has already repeatedly referred, the need was stressed for the relationship between civil liability and the State's liability to be clarified. In our view, there are two such relationships: one between the two types of liability as such, and the other between the channels used to assert them. The Special Rapporteur sees three possibilities in this area:

(a) First, the means taken up to and including the fifth report of the present Special Rapporteur: the draft articles did not deal with civil liability. What did this mean? The proposed instrument would have addressed only the State's responsibility and the diplomatic channel, with negotiation between States as the means of asserting it. On the other hand, by not prohibiting the use of the domestic channel, which was meant to assert the liability of individuals, and also conceivably of the State, it left open the possibility that those aggrieved would use that channel, while of course remaining subject to whatever was established by internal legislation in regard to civil liability, access to domestic courts, law enforcement and so on. The introduction, in this context, of the principle of non-discrimination contained in article 10 would naturally help prevent the possibility that said access might be denied in some legislations, and that victims in the States concerned might therefore not be able to use the domestic channel in the relevant States of origin. But if the draft articles do not make specific reference to civil liability, that principle may lose some of its efficacy in this field.

(b) The draft articles would regulate only the interrelationship between State liability and civil liability; they in no way regulate anything relating to the latter. In this case, we would only establish the priority to be assigned to one or the other type of liability, as well as the cases where the diplomatic channel should be used and those where recourse might be had to domestic courts of law. It should be added that the victims' situation as described under (a) would be the same in this case.

(continued)

principle of joint and several liability, except when an operator can prove that only a part of the harm could have been caused by the incident in his installation or site (see CJ-EN(90)11, p. 18).

(c) The third possibility is that pursued by the draft articles in the Sixth Report: in addition to regulating the said interrelationship, they also include some other provisions on civil liability that tend to create within the treaty system regulations that will ensure the application of the principle of non-discrimination (equal access), enforcement of national law in accordance with certain standards, and other minimum guarantees regarding the utilization of the domestic channel.

63. In the Sixth Report, article 28 basically provided for the simple coexistence of both channels so that, if the affected State decided to represent the individuals injured, it could do so without waiting for them to initiate, much less exhaust, the local remedies, which in fact were available under the domestic legislation of many countries in the international community (subpara. (a)). Nor was there anything in the articles, as was indicated in the second part (subpara. (b)) of the same norm, to prevent the State or the individual affected from submitting a claim for compensation in the courts of the State of origin, or, where individuals were concerned, the affected State as well. In any case, one claim could not be made simultaneously through both channels, diplomatic and domestic. The present report, in the part relating to State liability, has suggested that the relationship between the two kinds of liability should be such that the liability of the private party responsible should be invoked initially and that of the State only residually. As for the channel to be selected, that will depend on the circumstances. Negotiations could be opened if it were impossible to identify the parties responsible, although normally the matter would be handled by the domestic courts (or the international tribunal if that concept is accepted in cases of environmental damage). Moreover, it should always be kept in mind that the State may make a claim in case of a denial of justice; accordingly, it should be established that the State must, except in the cases of negotiation that we have spoken of, wait until local remedies have been exhausted before engaging diplomatic protection.

64. On this logic, chapter V should be placed after the present chapter IV, and article 28 should be modified so that its present paragraph (a) distinguishes cases where a denial of justice is claimed from those in which the State initiates a claim on the basis of these articles. It would then be placed under State liability, although if one State litigates in the courts of another State, the domestic remedy is in fact being used.

2. Channelling of liability

65. During the debates it was said persons bearing responsibility must be identified. Why should liability not be "channelled", as it is in most of the existing agreements on civil liability for transboundary harm? Thus, it was suggested that the operator would be the most appropriate person to bear liability. However, various instruments assign liability to various persons. For example, in the Elements quoted above from the protocol on liability of the Basel Convention on the Control of Transboundary Movements of Hazardous

Wastes and their Disposal, 24/ liability would be assigned, some maintained, to the generator, with subsidiary (but joint and several) liability of the person disposing of the waste in some cases. Others held that liability should fall on whoever was responsible for the transboundary movement or the disposal of the waste, or arranged those operations (perhaps also with joint and several liability). According to this approach, the persons responsible would be the generator(s), exporter(s), middlemen, importer(s) and disposer(s). 25/ Article 2 (b) of the European Convention on Products Liability in Regard to Personal Injury and Death 26/ places the responsibility on the producer. However, later in article 3 (2) it extends the concept of producer to those who have imported a product with a view to distributing it in the course of business, and to any person that has presented it as his own product by putting his name, trademark or other distinguishing marks on it. In other cases, if there is no producer, the supplier is responsible. The Vienna Convention on Civil Liability for Nuclear Damage 27/ channels liability toward the operator (art. II (1)), but in certain cases (art. II (2)) a carrier of nuclear material or a person handling radioactive waste may be considered an operator and so liable. Also, under the International Convention on Civil Liability for Oil Pollution Damage 28/ the owner of the vessel at the time of the incident (or of the first incident if there is a series of them) is liable for all pollution damage. Article 5 of the Draft Convention on Civil Liability for Damage During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels assigns liability to the carrier at the time of the incident. 29/ In the Draft Convention on Civil Liability for Damage Caused by Small Craft, it is assigned to the owner and user. 30/ When dealing with articles having such general application as these, use could be made of the technique employed in a proposal of the Committee of Experts on

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24/ See para. 54 above. Report of the Ad Hoc Working Group of Legal and Technical Experts to Develop the Elements which might be included in a Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements and Disposal of Hazardous Wastes and Other Wastes. UNEP/CHW/WG/1/3, p. 11, see elements 13, 14 and 15.

25/ Ibid., p. 11.

26/ Signed in Strasbourg, France, 27 January 1977 (International Legal Materials, Washington, D.C., vol. 16, 1977, p. 7).

27/ Signed in Vienna on 21 May 1963 (United Nations Treaty Series, vol. 1063, p. 265).

28/ Done in Brussels on 29 November 1969 (International Legal Materials, Washington, D.C., vol. 9, 1970, p. 45).

29/ TRANS/R.283, p. 6.

30/ Art. 4.

Compensation for Damage to the Environment of the Council of Europe, article 6: "Except as provided for in article 8 and in article 9, the operator in respect of a dangerous activity mentioned under article 2, paragraph 1, subparagraphs (a) to (d) shall be liable for the damage caused by the activity as a result of incidents at the time or during the period when he is in control of that activity." 31/ In turn, article 1, paragraph 6, which defines the "operator" as "... the person who exercises the actual control of a dangerous activity" appears between square brackets pending decision. 32/ Lastly, the Draft Code of Conduct on Accidental Pollution of Transboundary Inland Waters, article XVII, paragraph 4, says:

> "In order to ensure prompt and adequate compensation in respect of all damage caused by accidental pollution of transboundary inland waters, countries should in accordance with their national legal system provide for the identification of the physical or legal person or persons liable for damage resulting from hazardous activities. Unless otherwise provided, the operator should be considered liable; and where more than one organization or person is liable such liability should be joint and several." 33/

66. The solution chosen in the Sixth Report was not to become involved in identifying the persons responsible, but to leave that to be decided by the judge in the case in accordance with the principles of his national law. Under the present article 30, the applicable law is the national law of the competent court, which, therefore, should govern such cases. Our choice should be between leaving that formula in and introducing some extra criterion to help the court decide, for instance "channelling" liability towards whoever had control of the activity at the moment the incident occurred, unless the national law clearly assigns liability - depending on the activity in question - to certain other persons. In that way, there would be a certain latitude and there should be some flexibility so as not to hinder the action of the court.

31/ CJ-EN (91) 1, p. 23.

32/ The commentary says:

> "31. The CJ-EN noted that the Working Party, after considering possible definitions (e.g., person in charge of a dangerous activity, person who is in overall control, decided that this matter should be examined in greater detail and invited experts to send written comments and proposals for a new text.
>
> "32. The CJ-EN decided to keep this provision between brackets and examine the question in the light of any written comments or proposals from the Working Party."

33/ ENVWA/WP.3/R.1/Rev.1.

3. Miscellaneous

67. This section should also provide for the case of more than one operator (all operators being jointly and severally liable, as was recommended in the draft code of conduct mentioned above (in para. 65) and as is the rule in many other conventions and drafts on civil liability). The reasons for exemption from liability, which would be those of the present article 26, could also be spelled out in articles that would cover civil liability as well as State liability, as is suggested above. The limitation established in article 27 could apply both to the State and to the individuals liable. It might also be worth considering the possibility of authorizing a limit on the amount of compensation under national law. 34/

68. Articles 29 and 30 appear necessary and appropriate for the reasons given above. Article 31 should, it is suggested, be harmonized with the corresponding provisions of the draft on jurisdictional immunity being considered by the Commission. Articles 32 and 33 have not been commented on. In any event, their usefulness consists in improving the application of the other articles and in making possible the "prompt and adequate compensation" that the draft seeks to provide.

34/ "Alternative I: provisions of national law may limit the liability of the operator to a maximum amount [provided that such maximum is not fixed at a level lower than what can reasonably be covered by insurance or a similar financial security].

"Alternative II: 1. The liability of the operator for claims arising from any one incident may be limited by provisions of national law. However, this limit shall not be less than:

"(a) With respect to claims for death or personal injury ...

"(b) With respect to claims for any other damage ...

"2. The operator shall not be entitled to limit his liability under this Convention if it is proved that the damage resulted from his personal act or omission or an act or omission of his servants or agents, committed with the intent to cause the damage or recklessly and without knowledge that such damage would probably result, provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment." (Article 12 of the Council of Europe draft referred to above).